Supreme Court of Tennessee.

HENRY J. LYNN ET AL. v. M. T. POLK ET AL.

An Act of the Tennessee legislature to settle and compromise the bonded indebtedness of the state, which provided for the issuing of new bonds, the coupons on which should be receivable in payment of all taxes and debts due the state, except for taxes for the support of the common school fund, is unconstitutional.

The courts cannot enjoin the execution of a statute to fund a public debt because of alleged bribery of members of the legislature to pass it.

Where a statute forbids suits against a state or any of its officers, to reach the state, it does not prevent a taxpayer from enjoining an officer who is about to issue the bonds of the state in pursuance of authority conferred by an unconstitutional enactment.

APPEAL from the decree of the chancellor dismissing a bill filed by a number of citizens and taxpayers against the secretary of state, the comptroller of the treasury, and the state treasurer, constituting "The Funding Board." The bill set forth, that on April 5th 1881, the legislature of Tennessee passed an act entitled, "An Act to compromise and settle the bonded indebtedness of the state of Tennessee," which provided for funding the bonded indebtedness of the state with past due interest up to July 1881, by new bonds, to be issued through the agency of a "Funding Board." These bonds were to be coupon bonds, bearing interest at the rate of three per cent. By the 3d section it was provided, "that the coupons on said compromise bonds, on and after their maturity, shall be receivable in payment for all taxes and debts due the state, except for taxes for the support of the common school fund, and said coupons shall show upon their face that they are so receivable."

By section 5, it was provided, that the secretary of state, comptroller and state treasurer should constitute a board, to be designated a funding board, which was authorized when any legally issued bonds of the state or coupons were presented to it, to examine and audit the same, and if found genuine, to prepare and deliver to the holders compromise bonds, taking up the old bonds.

On May 25th 1881, complainants filed their bill against the Funding Board, alleging that the passage of the act was procured by fraud and bribery, and that the act itself was unconstitutional, and praying for an injunction to restrain respondents from issuing the compromise bonds. The chancellor dismissed the bill, and an appeal was taken from his decree.

Henry Craft, *A. S. Marks*, *David Campbell*, *N. N. Cox*, *George Gantt*, *S. A. Champion*, *T. A. Talliaferro* and *John J. Vertrees*, for complainants.

Thomas H. Mahone, *William M. Smith*, *Ed. Baxter*, *Spl. Hill*, *R. McPhail Smith* and *David Bright*, for respondents.

A separate opinion was delivered by each of the judges. The one given below is by

McFARLAND, J.—The object of the bill is to prevent the execution of an act passed by the General Assembly on the 5th of April, authorizing the funding by the issuance of new bonds of much the larger part of the present bonded indebtedness of the state. The aggregate of the new bonds thus to be issued, it is said, will be about twenty-seven millions of dollars.

Among other things, the bill charges that suits were pending against certain railroad corporations of the state, brought by holders of Tennessee bonds, claiming a lien on the roads, and that during the session of the last General Assembly a conspiracy was formed between said bondholders and said railroad corporations to procure the passage of the act in question, with the understanding that in such event the bonds would be funded and the suits against the railroads dismissed, and that for the purpose of carrying out this scheme a large and powerful lobby was organized and supplied with large sums of money and bonds, to corrupt and control the legislature, and procure that body to pass the law in violation of their pledges to the people and of the people's wishes, and that various improper influences were brought to bear upon members of the legislature, and that the final passage of the bill through the senate by a majority of one vote was procured by bribing two of the senators who voted for it, one receiving $10,000 and the other $15,000 for his vote.

The question is whether this court has jurisdiction of this question. I am satisfied, upon the most careful consideration, that it has not. This seems to be manifest from the organization of our form of government. The government of the state is divided into three departments—the Executive, Legislative and Judicial. The three combined represent the entire sovereignty of the state. Powers vested exclusively in one department cannot be rightfully exercised by the other. The legislative power is certainly vested in the General Assembly, and it is certain that the courts can exercise no part of the power, nor can either of these departments rightfully determine with what degree of fidelity the other has met its obligations. For this court to exercise the jurisdiction would be to assume that the co-ordinate departments of the government are liable to corruption, but the courts are not.

If we were to take jurisdiction and determine that this act was passed by bribery and corruption the legislature would have the same right to inquire whether or not our judgment was procured by the same means. These departments within their spheres are so far omnipotent that they possess all the power of the state belonging to that department, and in the exercise of these powers they are independent, neither being subject to the will or supervision of the other.

The members of the General Assembly, like the members of this court, are responsible to the people who elected them for the manner in which they discharge their trusts, and they may be impeached in the manner pointed out by the Constitution. The people may relieve themselves of the consequences of the corrupt and faithless acts of their representatives, but it was never contemplated that one department should sit in judgment upon the conduct of the other. If so we might set aside pardons granted by the executive upon the ground that they were corruptly granted, and the executive department might in turn refuse to permit our judgments to be executed upon the ground

that they were corruptly rendered, and from the collision and conflict, confusion and chaos would result. If we should take jurisdiction of this question, and an issue of fact be formed, it would then have to be tried upon the rules of testimony applicable to civil cases, only a preponderance would be necessary to establish the allegations of the bill, or, as held by a majority of this court, only a slight preponderance, so that if it be shown by a slight preponderance of testimony that one of the senators who voted for the bill was corrupted, we would then be compelled to declare that the act was not the will of the legislature, although it could not appear that the bribed member would not have voted for the bill, notwithstanding the bribe, and although the bill was passed with all the forms of the law.

And besides this result would be reached in a case to which neither the state or the impeached member is a party or has the right to be heard and where we would have no right to consider whether improper influences may have affected the other side of the controversy.

The ground upon which courts set aside unconstitutional laws, as we shall hereafter see, is wholly different. In such cases the courts simply determine whether there is conflict between the two laws—the constitutional and the legislative acts—and if so, the former must prevail.

The remedy when the passage of a law has been improperly obtained is to repeal it either by the same or by some succeeding legislature, and the wrong sustained in the meantime is generally not irreparable, and besides the remedy by repealing the law can be more promptly applied by the legislature than by the court. The correctness of this view as to ordinary legislation is conceded by the counsel for the complainants, but it is insisted that, as to contracts entered into by the legislature in behalf of the state, the rule must be different; that when a state contracts she lays aside her sovereignty and contracts as an individual, and all the consequences must result—that is to say, as the contracts of individuals may be set aside for fraud, the contracts of states are subject to the same rule. When courts acquire jurisdiction of contracts made by states they apply the same rules of construction to the state they do to the individual; give the same measure of justice to each. But it is a mistake to assume that in making contracts the state lays aside her sovereignty so as to give the courts jurisdiction without her consent to adjudge her liability. The state needs no such assistance from the courts. If the legislature has been bribed and corrupted to assume obligations that the state does not rightfully owe, the remedy is, in the first place, to repeal the law before the contracts are complete. This power with respect to the present law is now fully possessed by the governor and legislature. If satisfied that the law was procured by bribery it is a question for the consideration of the governor as to whether or not he will call the legislature together on the subject, and for that body to determine whether for this or for any other reason the law should be repealed. It does not meet the question to say that they will not perform this duty; they have the power, we have not.

And even after the law had been executed and the bonds issued, if it should appear that by corruption and bribery an unjust debt has been assumed in the name of the state, its good faith and honor would not require the obligation to be met, and whether it would or not would be a question for the people through their representatives to consider, as the

state is sovereign and cannot be coerced, so that whether future legislatures would recognise the obligation would be a question for them, and the people in their sovereign capacity need no relief from the courts.

But it is said that on account of a peculiar provision of the act known as the "coupon feature" it will, when executed, be irreparable, and the state for reasons hereafter to be considered then without remedy, and hence unless the courts now interfere the obligations entered into under a law thus enacted will be fastened upon the people and no means left by which they can resist them. I will consider this question when I come to the constitutionality of the "coupon feature," and it will then appear that in my view there is a remedy against such an emergency, but not the remedy we are now considering.

To assume the jurisdiction now insisted upon would not only be, as I think, wholly unauthorized upon principle, but directly in the face of all the judicial opinions that have been expressed upon the subject, which, considering the sources from which these opinions have emanated, it would be bold if not rash to disregard. I refer to Chief Justice MARSHALL in *Fletcher* v. *Peck*, 6 Cranch 87; *Sunbury & Erie Railroad Co.* v. *Cooper*, 33 Penn. St. 283; *Wright* v. *Defrees*, 8 Ind. 298; *McCulloch* v. *The State*, 11 Id. 424; *Ex parte Newman*, 9 Cal. 515; *Slack* v. *Jacob*, 8 W. Va. 612; *State* v. *Hays*, 49 Mo. 604; *People* v. *Draper*, 15 N. Y. 532.

There is scarcely to be found an intimation to the contrary. Whether a bill may be maintained to restrain individuals or corporations from receiving the benefits of their own fraud practised upon the legislature need not be considered, as I do not think this bill can take that shape as the bondholders or those supposed to be benefited by the law are not parties—the Funding Board only being defendants.

I come now to consider whether the act violates the Constitution of the state. Several objections have been taken to it on this ground, but the argument has been addressed mainly to what is known as the "coupon feature" of the act, and the question, in importance, undoubtedly overshadows all others. The bonds authorized by the act, as I have said, will aggregate twenty-seven millions of dollars. They are to run for ninety-nine years from the 1st of July 1881, redeemable at the pleasure of the state at any time after five years; they are to bear interest at the rate of three per cent. per annum, evidenced by coupons payable semi-annually in New York.

The third section provides that the coupons on and after the maturity shall be receivable in payment of all taxes and debts due the state, except for taxes for the support of the common schools and the payment of the interest on the common school fund, and said coupons shall show upon their face that they are so receivable. The ninth section enacts that the bonds shall be substantially in the form there set out. The form of the bond there set out contains this provision, to wit, "The coupons of the bonds as they become due are receivable for all taxes and debts due the state of Tennessee." I will not stop to consider the effects of the discrepancy between the third section and the form of the bonds set but in the ninth section, the former making the coupons receivable for all taxes and debts, with certain exceptions, the latter making them so receivable without exception. I will assume that the

third section is to prevail. The purpose of these provisions is manifest. The stipulation that the coupons are receivable for taxes and debts due the state, especially as incorporated into the bonds and coupons themselves, will, if valid, constitute part of the contract, and will be within the protection of the clauses of the Constitution of the United States prohibiting states from passing laws impairing the obligation of contracts, a provision which the federal courts have jurisdiction to enforce, and this notwithstanding the Constitution of the United States denies to those courts jurisdiction of such suits directly against the states. The federal courts take jurisdiction of the officers of the state and enforce this provision of the Constitution, notwithstanding the contract to be enforced be the contract of a state and the state be the real party in interest.

This is the well settled law of the Supreme Court of the United States: *Osborne* v. *U. S. Bank*, 9 Wheat. 738; *Dodge* v. *Woolsey*, 18 How. 331; *Banks* v. *Debolt*, Id. 300; *Furman* v. *Nichol*, 8 Wall. 44; *Hartman* v. *Greenhow*, 12 Otto 672; *Davis* v. *Gray*, 16 Wall. 203, and many other cases, so that if the act be within the power of the legislature and the bonds be issued, the provision in regard to the receivability of the coupons for taxes and debts due the state cannot be repealed so as to affect the holder's right during the ninety-nine years, or so long as any coupons remain unpaid, and any attempt to so repeal must be declared inoperative and void by the courts of the state in obedience to the mandate of the federal courts. The holders of the bonds and coupons, therefore, would have this security, that so long as each successive legislature shall levy any tax, especially any tax over and above taxes for the support of common schools and interest on the school fund, they would have the prior right to appropriate it before it reached the treasury by tendering the coupons in payment. The result, therefore, would be that no future legislature could, on any account, omit to levy the necessary tax to pay the outstanding coupons in addition to the current expenses and other debts of the state, and besides, when so levied, the holders of the coupons would have a prior claim on the whole fund, and whatever loss or delay might occur would fall or be liable to fall upon the other current expenses and debts of the state. Future legislatures would have no other alternative unless they refused to levy the necessary taxes to support the government. In short, the effect of the act is to place the question of the payment of these coupons and the manner of their payment beyond the control of any future legislature or even of the people themselves in convention assembled for ninety-nine years, if any portion of the coupons remain unpaid so long, and to take from such legislature all right to control the revenues raised by them to the extent of the sum necessary to pay the coupons or over eight hundred thousand dollars annually, and further to vest in the federal court jurisdiction to enforce the demand. The objection is not to the power of the legislature to make by law coupons receivable for taxes. This power is not denied. The objection is to the power to stipulate by contract that the law shall not be repealed. The question is, has one legislature the power to make such a stipulation binding upon any future legislature? I do not favor the doctrine that courts may declare acts of the legislature void upon the idea that they violate in some general and undefined

way the principles of republican government. I also adhere to the doctrine that in general state constitutions are to be construed as limiting and restricting, but not as granting legislative powers. If the power be in its nature legislative, then it belongs to the legislative department, unless some limit or restriction be found either in the letter or spirit of the Constitution. And in applying these limits and restrictions I have never been disposed to "stick in the bark," or to be too literal or hypercritical in construing the Constitution. But when I regard a vital principle violated, then I deem it my duty to declare the act inoperative, without resorting—out of mere deference to the legislature—to extreme or refined subtleties to sustain it.

I take it to be a sound and well-recognised principle, plainly deducible from our Constitution, that the legislative power vested in each General Assembly as the representatives of the people to legislate upon any subject, is limited to the two years for which they are elected, and it is clearly beyond their power to enact any law on any subject that may not be repealed by the same or any subsequent General Assembly. This I take to be a self-evident proposition, and one that will not be denied. One generation cannot legislate for the next.

The people through their representatives have at all times the right to change their laws to meet the exigencies as they arise.

But while this is admitted it is maintained that legislative enactment may also involve elements of contract that cannot be changed at the will of the sovereign power. The laws may be repealed but the obligation of contracts cannot be impaired.

Irrepealable laws may not be passed, but states may make contracts obligatory upon the people in the future. This is beyond question. By the custom of civilized nations they have the right to contract public debts not only obligatory upon the people who contract the debt, but upon future generations, otherwise they might in times of war be unable to preserve the life of the nation itself. But states in creating such debts act as sovereigns and cannot be coerced into payment. The faith, honor and credit of the state and of the people are pledged for the payment of the debt, but the people through their representatives in each successive legislature must be left to redeem their part of the pledge. It is not contended that there is any mode to coerce the state into the payment of an ordinary bond—I mean one without the "coupon feature;" but it is equally certain, as has been shown, that there is a mode by which payment of coupons of the character we are considering may be enforced.

The provision in regard to the coupon is not only a law regulating the collection and disbursement of the revenue and the conduct of the state officers, but under the construction put upon similar provisions by the Supreme Court of the United States it becomes part of the contract. The question, therefore, is: Can one legislature, in the form of a law, make a contract which surrenders the power of future legislatures to enact laws for the public good? Can one legislature surrender those attributes of sovereignty which are absolutely necessary not only to the well-being of the state but to its very existence? Stated in this form there can be but one answer. No such power can or ought to exist. The power from time to time to enact such laws for the public good, as may then appear necessary, is an essential element of sovereignty abso-

lutely necessary for the existence and well-being of the state and cannot be surrendered. But it is said if this proposition be carried to its full length it denies to the state the power to issue bonds in any form. That the power to bind the state by the "coupon feature" of the law is no higher power than to issue an ordinary bond. That in each case the faith, honor and credit of the state and its future revenues are pledged for the payment of the principal and interest of the debt, and nothing beyond this in either case. If the power exists to make one form of bond, it must exist to make the other, as the power to provide the manner of payment must be co-extensive with the power to create the debt. If the obligation contained in the "coupon feature" be allowed to stand upon the same basis as the bond without this feature, that is upon the faith and honor of the state, and bear the same construction, then this assumption might be correct. When questions of this character were first brought before the Federal court, it was insisted that the clause of the Federal Constitution prohibiting states from passing laws impairing the obligations of contracts, related to contracts of individuals, and that mere legislative acts of the state should not be construed as contracts which the Federal courts were vested with jurisdiction to enforce against the states, especially when by the Constitution the court could not take jurisdiction directly. Had this construction prevailed, then the form of obligation entered into by the state would not be very material. The state being sovereign could not be coerced to perform the obligation in either event, and, in making such contract, no higher power would be exercised in the one case than the other. But, as we have seen the decision of the question was otherwise, it was held that when provisions like the present are enacted, as to the manner of payment, the Federal court will take jurisdiction of the state's officers and enforce the law, as a contract, denying the state all right to repeal or impair it, and virtually in that event the state ceases to be sovereign in respect to her own obligations, and hence in making such contracts the state has surrendered her rights not only to act as a sovereign with respect to her own obligations, but also to enact such laws as may incidentally affect them. And we must bear in mind that by the construction thus given to acts similar in this respect to the coupon feature of this act, the law out of which the contract results becomes irrepealable. The difference, therefore, between the two characters of bonds is this: The ordinary bond pledges the honor and faith of the state; each successive legislature as the representative of the people is left to meet its part of the obligation; in doing so they act from the sense of honor and good faith which is supposed to actuate the people of a sovereign state and their representatives. It is for them to determine what honor and good faith require, but there can be no power to coerce their action. They are not bound by previous legislation further than honor and good faith require they should be bound, and of this they are to judge. By the issuance of the ordinary bonds the power to legislate in the future for the public good is in no sense relinquished. On the other hand, the bonds with the coupon feature not only pledge the honor and faith of the state, but practically take the matter entirely out of the control of the people or any future legislature, while the obligations last, not only as to the question whether the coupons shall be paid, but also as to the manner of their payment. The revenues to be raised by

future legislatures are to this extent not only pledged but actually appropriated and put beyond their control. To this extent they are deprived of all power of legislating on the subject. So it is apparent that the powers exercised in the two cases are essentially different. Had the legislature the power by contract to place the coupon provision of the laws absolutely beyond repeal while the coupons remain unpaid? It is said the question can never arise unless we suppose that future legislatures may disregard their obligations and refuse to levy the necessary taxes to meet the interest on the debt and other expenses of the state. Without this the necessity for a repeal can never exist, and it cannot be presumed that they will thus disregard their duty. I agree that we are to predicate no argument upon a presumption that any future legislature will violate its duty or act in bad faith. But the error of this argument is in the court assuming to decide that it will under all circumstances be the duty of every succeeding legislature to levy taxes to pay the coupons. This is not a question for the court. If a future legislature should become satisfied that the debt was unjust and fraudulent, procured by bribery and corruption, the honor and faith of the state would not require that it be paid. Of this the legislature would have to judge. It is said that this debt is an honest and just debt. If so, I trust the legislative department will always so recognise it. I certainly intend to express no doubt as to its validity, but the court has no jurisdiction to pass upon the question. The state as a sovereign power must determine for itself through its legislature the measure of justice that good faith requires it to render to its creditors.

Of course the state has the power to repudiate an honest debt, but we are to presume that the power will not be exercised. But, however just and honest this debt may be, if one legislature has the power thus to tie the hands of the future legislatures, as to the payment of honest debts, they may equally bind them for the payment of unjust debts. It is perhaps not impossible that legislatures may be bribed and corrupted to enter into obligations that ought not to be binding upon the people of the state. In such an event the state could not go into the courts to set aside its obligations upon the ground that its own legislature had been bribed and corrupted, and when the action of the Federal courts should be invoked to enforce the coupon contract and protect it from impairments, they would not listen to the charge that the state legislature had been bribed to make the contract, so that in such an event the state could practically no more resist the payment of a debt created by bribery than any other.

But aside from this, and assuming that no future legislature will ever doubt that this is a just debt, will it under all circumstances be their duty to levy taxes to pay the coupons? Public debts are to be paid by taxation; the creditor has no direct claim against the citizen. I do not undertake to define the extent to which the taxing power may go. But the right of the people and of the state to exist is superior to the claim of the creditor. The creditor who takes the bond of a sovereign government risks not only its honor and good faith but also the possibility that its debt may become too onerous to be borne. The government must exist, its people must live, otherwise all ability to pay debts would be destroyed, and whatever may be said of it, we know that upon the supposed want of ability to pay or for other cause the power to repudiate public debts, in whole or in part, has been frequently exercised in

modern times even by the most enlightened governments. These are infirmities attaching to all debts of this character.

But I am not to be understood as advocating the doctrine of repudiation or encouraging any tendency in that direction. I only assert that the right of the state to preserve its own existence and good government and the right of the people to support and maintain themselves is superior to the right of the creditor. This principle is recognised even in regard to private contracts, by our liberal exemption laws. In the event of war, famine or pestilence, is it possible that a legislature would not have the power to suspend the payment of these coupons, or postpone them to the superior demand for the preservation of the state and the people themselves? In such an event I do not think it can be denied that the power to repeal the laws would exist. We cannot know that such emergencies may not arise within the next ninety-nine years. It will not do to say that the legislature that passed this act determined that no such emergency would ever arise, and that it would never be necessary to repeal it; this is absurd.

It is said that such emergencies are improbable, extreme cases that may never occur, and that we need not now undertake to provide against them. True, we need not; but we must preserve in the government the power to provide for such emergencies if they should occur, the power to protect itself and its people in times of calamity and peril. Extreme cases may always be supposed in order to test principles. This is not arguing that the act in question may become unconstitutional upon such future contingency. The happening of such future contingency is referred to for the purpose of showing that the act was in excess of legislative power at the time it was passed. Then, if it be conceded that, under any emergency that may reasonably be supposed, the power to repeal the law would exist, then it seems to me to follow, inevitably, that the act which, according to the construction placed upon such acts, stipulates that it shall not be repealed was beyond legislative power.

It will not do to say that the legislature might make such a contract, but that we will annex to it the implied qualification, that upon sufficient emergency the law may be repealed and the contract impaired. This qualification necessarily destroys the whole contract. If the law may be repealed in any emergency, then who is to judge of the sufficiency of the emergency? Certainly not the courts; it cannot be said that the courts would uphold a repeal of the act if, in their opinion, it was upon an emergency justifying it, and disregard the repeal if the emergency was not deemed sufficient.

The considerations upon which the sufficiency of the emergency would have to be determined are not judicial in their character, but purely political and legislative. If then we consider that the sufficiency of the emergency is to be determined by the legislature, it inevitably results that they may repeal the law at pleasure and the contract is without validity.

But it seems to me, that if the power to make such contracts be conceded them, the right to repeal the law and abrogate the contract would not be recognised in any emergency. The question would come directly within the jurisdiction of the federal court. The decisions of that court, at least as they now stand, leave no room for doubt. They

say, if the state legislature makes the contract and has the power to make it, then it cannot be impaired by any subsequent legislation, and to ascertain the meaning of the contract, they disregard the construction of the state courts and construe it for themselves.

The court would not undertake to inquire into the circumstances of emergency or necessity under which the state legislature may have undertaken to repeal the law and impair the contract. It is said, however, that the jurisdiction is vested in that court, and whatever it might decide would be the law of the case, and we must presume they would decide correctly.

Jurisdiction is vested in that court to enforce the Federal Constitution against state laws impairing the obligations of contracts, and so it must determine whether the contract has been impaired. Their decisions are the supreme law upon this subject.

But whether our legislature has the power to bind the state by the contract, supposed to be impaired, is not a question for the Federal Supreme Court. This is a question depending upon the construction of our own Constitution and belongs to this court. If our Constitution denies to the legislature the power to make the contract, and this court so declare, I do not understand that the Federal Supreme Court has any jurisdiction to review our decision. It is certain that it would not if the law be declared unconstitutional, and the proposed contract without authority, in advance and its execution prevented, whatever it might decide in the event the question were to come up after the bonds are issued.

So, that when it is found that legislative acts of the character of this one are construed to be contracts by which the state is subjected to the jurisdiction of the federal court, and by which its sovereign power necessary for its own existence and well being is surrendered, the state court is well justified in declaring that no power exists in the legislature to make such a contract.

The state must reserve to itself and to each succeeding legislature the sovereign power to protect itself, and to attend to its own local affairs; its legislature can surrender no power not already vested in the federal government. Again, assuming that the debt will always be regarded as a just debt and that no calamity will ever occur rendering the people for the time unable to meet the interest, that each successive legislature will be willing, in good faith, to discharge the duty of levying the necessary taxes, still, it might in their opinion be necessary for the public good to change the manner of payment, and repeal the coupon section, collect the taxes in money, and pay the coupons at the treasury. This might become necessary to prevent the various tax collectors in the state, many of whom are unskilled in business, from receiving counterfeit coupons. The delay in the collection of taxes, even when an ample amount is levied, may, on account of the prior claims of the coupon holders be found to operate unjustly to the other creditors of the state, and create embarrassments for want of funds to meet the current expenses. The legislature might desire to obviate this by levying a separate tax, payable in money to meet the current expenses, leaving an ample amount payable as before in coupons to take up all that remain outstanding.

Neither of these changes supposes any purpose to repudiate the debt.

They would be perfectly fair and just and not inconsistent with perfect good faith, yet if the contract be valid neither of these changes could be made. Such changes in the laws might be necessary for the public good, and yet the legislature of a sovereign state without the power to make them.

We cannot determine, nor was it in the power of the last General Assembly to determine, that these changes would never be necessary or important. It is a power constituting an essential element of sovereignty, necessary for the purposes of government and cannot be surrendered, but must remain with the people and their representatives for the time being. The extent of the power is not important. If one essential element of sovereignty may be surrendered, why not all. Where is the limit?

It is argued, however, that for a consideration a legislature may relinquish part of the sovereign power, though not all. I know that this doctrine is established by numerous decisions of the Supreme Court of the United States with reference to provisions in charters of incorporation, by which, for a consideration, the right to levy taxes in the future has been held to be released.

We are bound by these decisions in similar cases, but we are not bound to apply the same doctrine elsewhere. The soundness of the doctrine has always been denied by some of the ablest judges of the Supreme Court, and has been met with solemn protests by some of the ablest state courts, and Mr. Justice MILLER has shown me one of his dissenting opinions that if the power be conceded to exist, no limit can be fixed to its exercise. These decisions must be left to stand upon their own peculiar ground, if, indeed, they stand upon any sound principles. I have carefully examined the case of *Antoni* v. *Wright*, decided by the Supreme Court of Virginia, 22 Grattan 833, and given to it the respectful consideration due to the courts of a sister state, but I cannot concur in the reasoning or the conclusion. I have already examined the grounds upon which it mainly rests.

The case of *Hartman* v. *Greenhow*, 12 Otto 672, did not present the question. The decision in *Antoni* v. *Wright*, afterwards re-affirmed by the same court, had been acquiesced in by the state officers of Virginia. The coupons in the latter case were not refused, the only effort was to deduct from them a tax upon the bonds. While the reasoning of the Virginia court is recited with apparent approval, yet it is manifest, the decision was regarded as settling the question, leaving only the question of the proposed tax to be decided in the latter case. The case of *Furman* v. *Nichol*, 8 Wall. 44, holds that the 12th section of the charter of the Bank of Tennessee, making its notes receivable for taxes was a contract attaching to the notes, that could not be impaired by subsequent legislation. The question, of course, has some analogy, but is not identical. The notes were intended to, and did for a time, at least, circulate as money. At all events, the question as to the power of the legislature to bind the state by contract like the present, was not considered or decided. The same may be said of *Woodruff* v. *Trapnall*, 10 How. 190.

The Supreme Court of the United States has not, in general, been disposed to question the power of state legislatures to make such contracts. I presume, as I have said, the construction of the state

Constitution as to the power would be a question for the state courts. Though in inquiring whether the contracts of a state have been impaired, the United States courts do not yield to the construction given by the state courts to the statutes, out of which the contract arises: *Jefferson Bank* v. *Shelley*, 1 Black 436; *Wright* v. *Nagle*, 11 Otto 794. We ought to entertain no feeling of antagonism toward the Federal Supreme Court. We should adopt its decisions where they are controlling without hesitation. We should not regard its decisions as those of a foreign jurisdiction. It is not to be denied that the extension of the jurisdictions of the federal courts over the states is, from a political standpoint, regarded with jealousy from some quarters, as indicating a tendency to encroach upon the rights of the states and strengthen the general government. In this contest it is not the province of this court to enter with anything of a partisan spirit. Upon this character of questions, however, Mr. Justice MILLER in a dissenting opinion, in which Justice FIELD and the Chief Justice concurred, in the case of *Washington University* v. *Rouse*, 8 Wall. 439, uses the language: "But we must be permitted to say, that in deciding the * * * validity of the contract, this court has been at times quick to discover a contract that it might be protected, and slow to perceive that what are claimed to be contracts are not so by reason of want of authority in those who profess to bind others."

This, he adds, has been especially apparent in regard to contracts made by legislatures of states. When it is seen that the result, in cases of this character is, by contract, to surrender to the federal court jurisdiction over the state itself in its local affairs, it cannot be wondered if, in view of the statement, state courts shall hereafter be a little slow to see the power to make such contracts. I trust, at this day, I have no special mania upon the subject of state sovereignty, but I cannot decline to assert so much of the powers of sovereignty as are yet conceded to the state.

It is said, however, the bill attacks the act upon the ground that the legislature cannot pass an irrepealable act, and hence this law is repealable, and at the same time assumes that the act is unconstitutional because it is not repealable. The argument is earnestly pressed, and it is insisted that the law is either repealable or it is not repealable; if it is repealable no relief is now needed, it will be for the legislature to repeal it at pleasure; if it is not repealable the complainants are entitled to no relief by their own showing. This, though ingenious, savors of "special pleading." If the section in question was only a law it would of course be repealable, but it involves also elements of a contract, and if the power exist to bind the state to these stipulations and the terms be accepted, then the contract could not be impaired. As to neither of these propositions can there be any doubt. Nor can there be any doubt under the decisions of the Federal Supreme Court that this is a contract. No difficulty can exist as to its construction and meaning. It was intended to prevent the repeal of the law. The question is not whether it is or is not a contract, or as to the meaning of the contract; but the question is whether the legislature had the power to bind the state to these stipulations. It is not an accurate statement of the position of the complainants to say that the act is unconstitutional because it is not repealable, but it is because it professes to authorize a contract

on behalf of the state which the legislature has not the power to make, that is, a contract relinquishing part of the sovereign power of the state. Of course, if the law be unconstitutional it may be so declared even after the bonds are issued, but it does not follow that it may not be so declared in advance. It is assumed that the question cannot arise until there is an attempt to repeal the law, as until then there is no real case. But this overlooks the fact that this is not only a law, but professes to be a contract. If the court has the jurisdiction, and the proper parties are before it, no doubt can exist as to the right to declare in advance the want of power to make the contract and prevent its consummation. If such jurisdiction exists, it would, in every view, be better to exercise it now rather than allow the bonds to be issued and afterward allow the coupon section to be repealed and the contract changed. Of course, we cannot know that the attempt would ever be made to repeal it, but the bonds, in the form proposed, would contain an unwarranted assumption upon their face, and be calculated to deceive and mislead innocent purchasers and make litigation. The Supreme Court of the United States enjoined the board of liquidation of Louisiana from issuing bonds of the state to certain persons, upon the ground that an act of the legislature authorizing it indirectly impaired the rights of the complainants under a former act; 2 Otto 531. In *Davis* v. *Gray*, the governor of Texas was enjoined from issuing grants to a large body of land, upon the ground that it would interfere with other titles: 16 Wall. 203, and there are various other cases holding that it is proper to grant the relief in advance: *Mott* v. *Pennsylvania Railroad*, 30 Penn. St. 9; *Bradley* v. *Com.*, 2 Humph. 428; *Winston* v. *T. & P. Railroad*, 1 Baxter 60. If this law in terms authorizes the defendants to enter into contracts in the name of the state, containing stipulations to which the state, under the Constitution, cannot be bound, then there ought to be no reluctance in so declaring, or any "straining of the timber" of the law to avoid the result. It may, no doubt, be thought that there are strong reasons why the court ought, if possible, to sustain the settlement. The state, it may be said, has large resources, the debt is not beyond our means, it has been a disturbing element in the state, the reputation of our people for honor and integrity is at stake, and the court ought from these considerations to resolve all doubts in favor of the law, brush aside all technicalities and abstractions and sustain the action of the legislature if possible, because it is a favorable settlement, and it is of great importance to the state that it should be sustained. To defeat this settlement of the public debt, is, I know, assuming a great responsibility. I certainly could not undertake to do so upon a mere technicality or abstraction. I cannot, of course, know that this law would ever injuriously affect the state, it might not; the burdens might be submitted to and borne without injury or complaint. But if it involves a vital principle of constitutional law, essential in its nature to the preservation of the state and the rights of the people, then this principle cannot be surrendered, upon the suggestion that in this instance it would do no harm, and that it is for a good purpose. A radical error, once established, may do incalculable injury. I cannot undertake to speculate as to the consequences. My duty is to respond to the question presented by the record. The political considerations are not for the court. It simply resolves itself at last into

the question whether the sovereign power of the people of this state to deal with their public debt, to raise revenue by taxation and appropriate it, and enact laws in regard to the manner of such collection shall remain with them and their representatives, as they shall from time to time assemble, or shall those powers be held to have been surrendered by the contract of one General Assembly for ninety-nine years, and the jurisdiction thereby vested in the federal court to coerce the state into the performance of the contract.

It must be remembered that if this contract be valid, the people of the state cannot change it even by a constitutional amendment. They cannot, even in this mode, impair the obligation.

The last General Assembly, actuated, no doubt, by a patriotic desire to redeem the honor of the state and do justice to its creditors, undertook to satisfy their demands by putting the obligation in such form that no future legislature could question the settlement or change the manner of payment. This feature of the law seems to have had its origin in a want of confidence in the integrity of the people and their future representatives. In this I think the legislature exceeded its power. The responsibility of making provision on the debt, the honor and good name of the state must be left with the people. If they, in an evil hour, should choose to violate their faith and bring reproach and dishonor upon themselves by repudiating debts that in justice they ought to pay, it will indeed be a sad calamity, but I am not to presume that such an event can ever occur. The people of this state cannot be guilty of so great a folly and so great a crime; but if they choose to do so I do not know how they shall be prevented. One legislature has no power to act upon such a presumption and bind the people by a contract which surrenders their sovereign powers.

It remains then to be seen whether the court has jurisdiction and the necessary parties to render a decree. It is argued with great earnestness and force that the court cannot take jurisdiction of this case, because it is in effect a suit against the state, or against "officers of the state, acting by authority of the state, with a view to reach the state."

The Constitution allows suits against the state in such manner as the legislature may provide, but as there is now no law providing for such suits it is conceded that they cannot be maintained. On the contrary, the Act of February 28th 1873, declares that no court in this state shall have jurisdiction "to entertain any suit against the state, or against any officer of the state acting by authority of the state, with a view to reach the state, its treasury, funds or property."

We have decided quite a number of cases since this act was passed, awarding the process of mandamus against the comptroller to compel him to issue warrants against the state allowed by law: *Burch* v. *Baxter*, 12 Heiskell 601; *Publishing Co.* v. *Burch*, Id. 607; *Uhl* v. *Gaines*, 4 Lea 352, besides quite a number of unreported cases. The effect of the Act of 1873 seems to have been considered in those cases; but it would certainly not be construed to deprive the court of jurisdiction to compel a ministerial officer to perform a plain ministerial duty, and when the demand of the relator is allowed by law it is the plain ministerial duty of the comptroller to issue his warrants, even though in determining this question the court may have to declare the legislative acts unconstitutional. Otherwise, the decision of the comp-

troller would be final, and the party having a demand allowed by law without remedy. Such proceedings, so far from being suits against the state, are, in fact, suits in the name of the state to compel its officers to perform their duty.

There are cases, however, where the ministerial officer is vested with discretion in the discharge of his duties, a discretion which the courts cannot control. They may compel him to perform his duty, but may not determine how his discretion shall be exercised. The principle upon which mandamus is awarded against ministerial officers in such cases is not that the state is coerced, or its officers compelled to perform acts against the will of the state, but precisely the reverse. They are compelled to perform the will of the state as expressed by law—in general, the only manner in which it can be expressed. It is claimed that the defendants in this case are officers of the state, acting by authority of the state, and hence cannot be interfered with in the discharge of the duties imposed by the Act of 1881, without directly violating the Act of 1873, above set out.

The only evidence that they are, in this matter, acting by authority of the state, is the Act of 1881, under consideration; if it is out of the way then they have no authority. In that view, so far from their proposed acts being by authority of the state, they would not only be acting without authority, but in direct violation of the will of the state.

The state cannot be supposed to be standing behind its officer urging the execution of an unconstitutional law, especially when there is nothing to show this but the unconstitutional law itself, otherwise a void law for this purpose would be as effective as a valid law. But it is said the court cannot reach the question of the validity of the law—that the jurisdiction is defeated *in limine*.

It is true the court cannot take jurisdiction of the state for any purpose, but it has undoubted jurisdiction of the defendants. The objection to the exercise of the particular jurisdiction against them is that they are officers of the state acting by authority of the state. To determine this the court must look to their authority. It cannot accept their mere assumption. If the authority be wanting, or the law which they claim gives them the authority be void, then they are not acting by authority of the state. It is true they would have color of authority. A law is *prima facie* valid, but if the court can look far enough to see this much, they can look farther and see that it is in fact void. This rule is firmly established as respects the jurisdiction exercised by the Supreme Court of the United States in enforcing the clause of the federal constitution against state laws impairing the obligations of contracts, even where the contract to be upheld is the contract of the state. In such cases, although the state officers may be acting under the authority of a law of the state *prima facie* valid, and, although the 11th amendment to the federal constitution prohibits the suit against the state, yet the federal courts take jurisdiction of the officer, and if the law of the state under which he is acting be found to impair the contract embraced in any previous act, the former is declared void, and the officer is compelled to execute the law as the court may declare it. The court says that such are not suits against the state, although the state be the real party in interest: *Osborn* v. *Bank of U. S.*, 9 Wheat.

738; *State Bank of Ohio* v. *Knoop*, 16 Howard 369; *Dodge* v. *Woolsey*, 18 Id. 331; *Bank* v. *Debolt*, Id. 380; *Jefferson Bank* v. *Skelly*, 1 Black 436; *Davis* v. *Gray*, 16 Wallace 220; *Woodson* v. *Murdock*, 22 Id. 351; *Board of Liquidation* v. *McComb*, 2 Otto 531. In the latter case, the board of commissioners of Louisiana, of which the governor was a member, was restrained by injunction from issuing bonds of the state which were expressly authorized by an act of the legislature of Louisiana. They pleaded the authority of the act. The court said the state could not be sued, but that an unconstitutional law was no authority for the non-performance or violation of duty, but would be regarded as merely void. So, notwithstanding the act authorizing the bonds to issue, it was held to be the plain duty of the board not to issue the bonds, and one about which they had no discretion. So, in *Davis* v. *Gray*, *supra*, the Governor of Texas was restrained from issuing grants for land in the state, although expressly authorized by an act of the legislature *prima facie* valid. It is said, however, that these decisions only establish the rule of the United States courts when exercising the jurisdiction of that court to enforce the constitution and laws of the United States, that is to say, the clause prohibiting states from passing laws impairing the obligation of contracts; but when they exercise concurrent jurisdiction with the state courts dependent upon citizenship the rule is different.

In these cases first named, the rule must be the same in the state as in the federal courts. It is as much the duty of the state as the federal court to uphold the Constitution of the United States and declare void all laws impairing the obligation of contracts, and for this purpose to entertain suits against officers of the state. They cannot escape this duty by holding a suit against the officer to be a suit against the state. A judgment on this ground would be reversed by the federal Supreme Court, and by its mandate the state court would be required to enter a judgment against the officer. So that the argument insisted upon would lead us to this conclusion—In cases involving the provisions of both the state and federal constitutions against laws impairing the obligation of contracts, the rule would be, that a suit against an officer is not a suit against the state. If it involve any other provision of the state constitution the rule would be exactly the reverse. It would seem that, upon principle, the rule ought to be uniform. We have a number of cases in which officers and agents of the state have been restrained by injunction from carrying out laws which result in violating the Constitution, as for instance the establishment of new counties. The leading case on this subject is *Bradley* v. *Commissioners*, 2 Hum. 428, which has been repeatedly followed. (See also, *Mott* v. *Penna. Railroad*, 30 Penn. St. 9; also *Galloway* v. *Jenkins*, 63 N. C. 147; also *Winston* v. *T. & P. R. R.*, 1 Baxter 60.)

The cases, however, of *Bradley* v. *Commissioners*, *supra*, and others of a similar character, were before the Act of 1873, and the mandamus cases before referred to did not consider its effect.

This question was considered in the case of the *State* v. *Sneed*, 9 Baxter 472, in which it was held that the Act of 1873 deprived the court of jurisdiction by mandamus to compel the tax-collectors to receive the notes of the Bank of Tennessee issued after May 1861, in accordance with the 12th section of the charter. It will be found, however,

that the real ground upon which this decision rests is, that by another act of the same session, chapter 44, Acts of 1873, a new remedy was given, that is to say, to pay the taxes in money under protest, and sue the collectors to recover back the sum paid, and, in this view, chapter 13, of the Acts of 1873, did not impair the contract contained in the 12th section of the bank charter, and it was upon this ground the validity of the act was recognised by the federal Supreme Court. The Act of 1873, chapter 13, does profess to take away all jurisdiction against officers of the state in the cases named. The act was, no doubt, intended to protect the treasury and taxes of the state and its property, even against claims that might be valid. It was principally intended, no doubt, to protect the state from being compelled to litigate with the taxpayers as to their right to pay their taxes in the new issue of the Bank of Tennessee, and have the collection of taxes suspended by these suits. The necessities of government require summary remedies for the collection of revenue, and to secure this was the principal object of the act, and it may be that in some cases this court has extended the act to an unwarranted length in protecting state officers. I think it could not have been intended to deprive the citizens of all remedies in any case to protect themselves by injunction against the execution of unconstitutional laws by officers of the state.

The object is not to reach the treasury funds or property of the state, or to reach the state or interfere with its laws or the administration of its public affairs. It is precisely the reverse. It is to protect the treasury funds and property of the state, and to protect the state from the consequences of unauthorized acts about to be performed in her name. The only ground, I repeat, upon which it can be assumed that it is the will of the state that the bonds be issued, is the unconstitutional void law.

There are cases where executive officers are vested with sole discretion to determine the validity of the law under which they act, and where their action cannot be controlled by the court or its validity questioned afterwards. Such was the question of *Jonesboro Turnpike Co.* v. *Brown*, 8 Baxter 490.

There are other cases where, although the court will not control action, the same question may come before the court and be decided differently, such was the case of *Williams* v. *Register*, 1 Cooke 213. The executive department of the government cannot be delayed and embarrassed in the execution of the laws necessary to the administration of its affairs, until the constitutionality of the laws be determined by the courts: *Mississippi* v. *Johnson*, 4 Wallace 475.

The question of the constitutionality of this law is one ultimately for the courts. It cannot be held that the funding board were vested with exclusive jurisdiction to determine the validity of the law. Their decision could not, in the nature of things, be final. If they were to determine the law unconstitutional and refuse to issue the bonds, the court would, no doubt, have jurisdiction by mandamus, if it decided the law valid, to compel them to act. On the other hand, the court determining the law unconstitutional, have the jurisdiction to restrain their action by injunction, as in such cases mandamus and injunction are correlative remedies: *Board of Liquidation* v. *McComb*, 2 Otto 531.

So that in any event it is a question for the courts. It therefore

becomes a question whether it is to be decided now or after the bonds are issued. If the court has jurisdiction and the proper parties before it, there is every reason why the injury should be prevented rather than attempt to remedy the wrong afterward: *Mott* v. *Penna. Railroad Co.*, 30 Penn. St. 9; *Davis* v. *Gray*, 16 Wallace 203; *McComb* v. *Board of Liquidation*, 2 Otto 531.

It is said the state is an indispensable party. If the state can be made a party in such cases it should be done; that it cannot, is a sufficient reason for not doing so: *Davis* v. *Gray*, 16 Wallace 220. The attorney-general for the state or any counsellor employed by the governor would have been heard if they so desired.

The funding board are the only persons who could have been made defendants. The creditors have as yet taken no benefit under the act, and are besides unknown, and are too numerous to be made defendants: *Davis* v. *Gray*, *supra*.

The complainants only have the interest of citizens and taxpayers in common with all other citizens and taxpayers of the state. This would clearly not give them the right to prevent the execution of any unconstitutional law that might incidentally affect them. But such an interest has been held sufficient to entitle them to prevent the establishment of new counties: *Bradley* v. *Com.*, 2 Humph. 428; the issuance of illegal bonds by a county: *Winston* v. *T. & P. Railroad Co.*, 1 Baxter 60; also to prevent the execution of an unconstitutional law by which the states right of taxation was to be relinquished: *Mott* v. *Penna. Railroad Co.*, *supra*; also, to prevent the issue of unauthorized bonds: *Galloway* v. *Jenkins*, 63 N. C. 147.

To suspend the execution of this law will not interfere with or embarrass the general administration of the public affairs of the state, either with respect to its internal government or in the consummation of any public enterprise upon which the prosperity of the state may be supposed to depend.

The creditors already hold the bonds of the state. To suspend the execution of the act will only prevent the exchange of their bonds for others, which, in my opinion, would contain stipulations by which the state cannot be bound; and, if in this I am correct, it is to the interest of the creditors to have it so now declared.

I am of opinion that the decree of the chancellor dismissing the bill is erroneous.

The first of the head-notes prefixed to the foregoing report of this case is sustained by the opinions of Justices McFarland, Turney and Freeman, but dissented from by Chief Justice Deaderick and Special Justice Ewing. The second is sustained by the opinions of Justice McFarland, Chief Justice Deaderick and Special Justice Ewing, but dissented from by Justice Freeman, no opinion being expressed by Justice Turney. The third is sustained by the opinions of the chief justice, and all the justices, but dissented from by the special justice.

It is a subject of regret that all the opinions cannot appear in this place, but their length renders it impossible. Mr. Justice Turney places his judgment wholly upon the coupon feature of the act pretermitting any expression of opinion on the subject of bribery of the legislature, while Mr. Justice Freeman, in an able exposition of the principles that are involved in the consideration of that question, reaches the conclusion

that, when an act of the legislature, public or private, is in the nature of a contract, and particularly where that contract becomes irrepealable under the federal constitution, and is procured by the bribery of the members of the legislature, it is no invasion by the court of the province of the legislature to enjoin its execution, so that the people shall not become burdened by a law imposed by that character of fraud. He carefully limits the application of the remedy to *contract* enactments, and agrees that as to all other legislation the remedy by repeal is effectual. Mr. Justice McFARLAND seems to find relief in that case, not in the power to enjoin the execution of the act, but of the people to repeal it, if it be repealable, but if not, to repudiate the fraudulent contract; and the three assenting justices may be assumed to have left the remedy there or to have declared there is none. Where the party bound by the contract is a sovereign state, this may be an effectual remedy, but where it is a municipality, as a county or town, this might be no remedy at all, unless the sovereign state withdraws the powers of taxation, as in *Meriwether* v. *Garrett*, 102 U. S. 472. In any case, an innocent party in possession of the bond or other evidence of debt, suffers where the remedial injunction is not applied under the rule of Mr. Justice FREEMAN. On this point relating to bribery of the legislature, that learned justice says:

"If the Constitution forbids this inquiry, if it can never be made by the courts in any case—and if it does not so forbid, it ought to be made in the case of contracts proposed to be made, if anywhere—there is no other remedy. If executed in the form of the bonds in this case, it is idle to say the legislature can repeal the law. The contract will be held unaffected and enforced in spite of that. To say the state shall repudiate the debt is not remedy, but only the act of force or will that cannot be coerced. That the member can be expelled from the legislature is no remedy, it is only punishment inflicted by the state. To say that his constituency can refuse to elect him is equally futile. They could do that in any case. But that would not affect the liability of the bonds in any way, that would remain precisely the same in both cases, and so the end sought would be totally ineffectual and no remedy at all."

Again, "I would hold that, in all cases of private contracts obtained by individuals for their own benefit or advantage, where it could be clearly shown the assent of the members, or sufficient of them, to pass the bill was procured by bribery, the contract as between the state or her taxpayers and the parties so bribing, is one that may be avoided, and on a proper case the courts should fearlessly apply the remedy. No restraints of delicacy should make them hesitate. I confine my opinion strictly to the case before me, and to like cases, and to acts of the legislature making or proposing to make contracts, expressly repudiating the application of the principle to legislation in the general sense, or in any case except the one indicated. Such an application of the principle is, I think, perfectly safe, can do no injury, and is not, as I think, any infringement upon any affirmative or implied inhibition of the Constitution."

The three opinions which discuss this question are instructive and exhaustive, but our readers must forego the benefit of a full publication for want of space.

Mr. Justice TURNEY pretermits the question just mentioned as unnecessary to the determination of the case, as a majority are agreed that the act is void because of the tax-coupon feature of it. On this point he agrees with McFARLAND and FREEMAN, JJ., and discusses the question very much as they do, but gives an additional ground

for his judgment not noticed by them. It violates that provision of the state constitution which appropriates the taxes derived from polls to *educational* purposes, the exception of the statute in favor of the *common school fund* not being commensurate with the constitutional provision: Const. 1870, art. 11, sect. 12.

Mr. Special Justice EWING, sitting in place of Mr. Justice COOPER, who was incompetent by reason of interest, thinks the bill should have been dismissed for want of jurisdiction, because it was substantially a suit against the state or its officers, and forbidden by the Act of 1873, and because the court could only grant relief, if at all, at the suit of the state, but not of the taxpayers. He thinks the tax receivable coupon feature objectionable, perhaps, as a matter of policy, but clearly within the power of the legislature; and that because it is a *contract*, and from that circumstance the federal courts might acquire the ultimate jurisdiction to pass upon its validity or the right to repeal it, is no sound objection to it. It must be presumed those courts will decide properly. He says: "The law may be unwise, but it is not for that reason unconstitutional. If it be unconstitutional upon future contingencies, there is no possibility of its becoming oppressive, as relief could always be had by legislation, which must be sustained by the courts. It is upon the possibility of its becoming oppressive that the argument is made against its constitutionality. But it is neither unconstitutional *in presenti* nor *in futuro*, because of these possibilities. Its oppression under changed circumstances may be relieved against. The fear that this which is called an unconstitutional act may be enforced by the federal courts as a constitutional law, is not, I repeat, a legitimate argument in favor of an injunction, because it supposes that the federal courts will not do right. What then, if our legislature had no federal restriction, and the omnipotence of parliament, would the law be repealable and therefore valid? Does this legal restriction then determine the character of the law? The federal restriction reducing our sovereignty may disable us from repealing acts, right or wrong, and therefore may make it unwise for us to pass laws of contract which we may not repeal, but does it affect the power? The legal restriction should be looked to in the exercise of the power as in any event it attaches."

This strikes the most vulnerable place, perhaps, in the position of the majority if it fairly states that position. But it also suggests a potential reason for constitutional inhibition on the legislature from passing "laws of contract which we may not repeal," as that is by far the safest guaranty against unwise laws of contract. The Tennessee Constitution of 1870, did much in that direction by substituting section 8, of art. 11, for section 7 of the same article, in the Constitution of 1834, but it certainly falls short of the entire restriction which would be contained in a reservation of power to alter, amend or repeal all laws, by which every state constitution could possibly limit the prohibition of the federal constitution, in its practical operation, to those laws which might impair private contracts. But the principle of the majority ruling in this case operates to protect the state against any contract that bargains away or imposes restrictions upon the absolute powers of taxation and appropriation of the public revenue, by declaring the contract itself void, whether the act be repealable or irrepealable. What is said about the federal restriction is rather in favor of the remedy by injunction, than applicable to the character of legislation as being valid or invalid. The court secures to itself, by sustaining that remedy, the right of ultimate decision in construing the state constitution, and ren-

ders unnecessary any appeal to the federal Supreme Court to construe the federal Constitution. This is, probably, an unnecessary precaution, as the latter court would quite surely follow this very decision, whatever its own judgment might be, if it should have occasion hereafter to hear the question, as it followed the Virginia court the other way. It does not follow the vacillations of the state courts in the construction of state constitutions, but otherwise is quite obedient to them.

On the general subject Mr. Justice EWING, says: "If it is unconstitutional at all it is not upon speculative possibilities. If it were absolutely certain that the state would always retain its present ability to meet interest and provide for ordinary governmental expenses, there would be no ground for the charge that it is infringed upon. Absolute sovereignty in a republic may consist with moral obligation which is neither coercive nor derogatory to sovereignty. * * * When the ability is lost it may well be that the moral obligation ceases or is suspended. The new circumstances may justify a repeal, and this repeal we must suppose would be sustained by the federal courts, as not impairing the obligation of contracts. In this view the coupon feature becomes merely a convenient mode of providing for payment of the public debt." The learned judge discusses all the questions elaborately and with distinguishing ability, but want of space forbids further extracts.

To the above argument the majority opinions reply that the objectionable coercion is not found in the moral obligation, but the power to compel payment regardless of that consideration and against the will of the people as it may exist at the moment at which any particular payment is demanded within the ninety-nine years the bonds mature. And, they do not think it safe to rely on any court to hold that the fact of impairment of the obligation protected by the federal constitution depends, in any way, upon a change of circumstances simply in respect to ability to pay. See *Sturges* v. *Crowninshield*, 4 Wheat. 122. That might devolve on the courts the legislative function of determining when the ability to pay is gone, and permit them to do that which is prohibited to the legislature, namely, to impair or abrogate the obligation according to changing circumstances disconnected with the contract itself, their judgment being only a review of the action of the legislature on the question of fact whether the debtor was able to pay.

Mr. Justice WASHINGTON, in defining the obligation alluded to by the Constitution says, in *Ogden* v. *Saunders*, 12 Wheat. 258, "It cannot, for a moment, be conceded that the mere moral law is intended, since the obligation which that imposes is altogether of the imperfect kind, which the parties to it are free to obey or not, as they please. It cannot be supposed it was with this law the grave authors of this instrument were dealing."

The question of the suability of the officers appointed to fund the debt, and that of the right of a taxpayer to file the bill, are instructively discussed, but being of somewhat local interest the points are not further noticed here. The conclusions of the venerable chief justice, being very brief, are subjoined as follows:

"The main question arising in this case has been so elaborately and exhaustively discussed in the four opinions already read, that I deem it unnecessary to repeat reasons already given or cite authorities already referred to, to sustain the conclusions at which I have arrived upon the several questions involved.

"I content myself, therefore, with the simple announcement of the conclusions at which I have arrived upon the several propositions contained in the bill and discussed at the bar.

"1. I am of opinion that the title of the act, 'to compromise and settle the bonded indebtedness of the state of Tennessee,' sufficiently expresses the subject thereof; that it contains but one subject, the several sections of the act being pertinent to the object expressed in the title, and, therefore, it is not void, as being repugnant to sect. 17, of art. 2, of the Constitution of Tennessee.

"2. I am further of opinion that the courts of the state have no power to review or reverse the legislative action of the General Assembly, except for the reason that such action is a violation of the Constitution; and that such action, if within their constitutional power, cannot be questioned by the courts of the state upon allegations of fraud and bribery.

"3. I am also of opinion that taxpaying citizens may file their bill to protect themselves from the injurious operation of a threatened and impending act, which is alleged to be unconstitutional, although such act is about to be performed under the apparent authority of the state. The court may inquire if there exists legal authority for the act, if so, it will not impede or obstruct it. On the other hand, if it appears it is prohibited by the fundamental law, it should restrain it upon the ground that the injurious act about to be done is unauthorized by law.

"4. I am, therefore, of the opinion that the constitutionality of the act is fairly presented to this court for its decision, and that the question for our deliberation is, had the legislature the power to pass it? And in my opinion it had the power—there being no inhibition or restraint in the Constitution to prevent it from doing so.

"I therefore concur with Judge EWING in holding that the act is constitutional and valid, and that the chancellor's decree dismissing the bill should be affirmed."

It is proper to explain that no one opinion can be called the opinion of the court, but that of Mr. Justice MCFARLAND discusses *all* the points on which a majority of the judges agreed, and is, therefore, selected for publication in full. H.

ABSTRACTS OF RECENT DECISIONS.

SUPREME COURT OF THE UNITED STATES.[1]

SUPREME COURT OF ARKANSAS.[2]

SUPREME COURT OF GEORGIA.[3]

COURT OF ERRORS AND APPEALS OF MARYLAND.[4]

SUPREME JUDICIAL COURT OF MASSACHUSETTS.[5]

SUPREME COURT OF MISSOURI.[6]

ACKNOWLEDGMENT.

Married Woman—Evidence.—A married woman's acknowledgment

[1] Prepared expressly for the American Law Register, from the original opinions filed during Oct. Term 1881. The cases will probably appear in 14 or 15 Otto.

[2] From B. D. Turner, Esq., Reporter; to appear in 37 Arkansas Reports.

[3] From J. H. Lumpkin, Esq., Reporter; to appear in 66 Georgia Reports.

[4] From J. Shaaff Stockett, Esq., Reporter; to appear in 56 Maryland Reports.

[5] From John Lathrop, Esq., Reporter; to appear in 131 Massachusetts Reports

[6] From T. K. Skinker, Esq., Reporter; to appear in 74 Missouri Reports.